UNITED STATES
v.
JOSEPH J. SEGNA, ET AL.

IBLA 79-254 Decided July 22, 1980

Appeal from decision of Administrative Law Judge R. M. Steiner declaring mining claims invalid. CA-4906, CA-4967.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally
When the Government contests a mining claim on a charge of no discovery, it assumes the burden of going forward with sufficient evidence to establish a prima facie case; the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence.

2. Mining Claims: Common Varieties of Minerals: Generally

Without evidence that limestone has a property giving it a special and distinct value, it is a common variety no longer locatable under the United States mining laws. The test of "uncommonness" is not met by speculation that the mineral material might be extracted in blocks of sufficient size as to permit slabs suitable for making table tops or other ornamental use.

3. Administrative Procedure: Burden of Proof -- Evidence: Generally -- Mining Claims: Determination of Validity

The Board adopts a decision of an Administrative Law Judge holding mining claims null and void for lack of discovery

of a valuable deposit of an uncommon variety of limestone, where nondiscovery is established by the totality of the evidence.

4. Administrative Practice -- Administrative Procedure: Administrative Procedure Act

The procedures followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases are in full compliance with the Administrative Procedure Act.

APPEARANCES: Ian G. Allen, Esq., Sunnyvale, California, for appellant;
Charles F. Lawrence, Esq., Office of General Counsel, U.S. Department of Agriculture, San Francisco, California, for Government.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Joseph J. Segna, Isabella Segna, Ian G. Allen, Mary C. Allen, John W. Birchall, and Mildred G. Anderson appeal from a decision of Administrative Law Judge R. M. Steiner, dated January 31, 1979, declaring the Lucky 7 and the Hope placer mining claims invalid.

On April 17, 1978, the Bureau of Land Management (BLM), issued complaints, charging, inter alia, that the subject mining claims were invalid because they had not been perfected by the discovery of a valuable mineral deposit.

After the contestees filed timely answer an evidentiary hearing was conducted on August 29 and 30, 1979, at Sacramento, California.

[1] Appellants argue on appeal that the Government failed to establish a prima facie case because their witnesses failed to address the value of the mineral as calcite marble for use as ornamental building stone, and for other ornamental uses. They charge that the Government mining engineers could not recognize "the higher and better use of the stone" because neither of them had any experience with limestone used as marble.

Uncontroverted evidence of nonproduction of a mining claim, which has continued over a period of years, is sufficient, without more, to establish a prima facie case of invalidity of a mining claim. United States v. Hess, 46 IBLA 1 (1980).

As to the burden of a contestee in proceedings such as this contest, United States v. Bryce, 15 IBLA 340 (1973), states:

> It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by government mineral examiners. Mineral examiners have no affirmative duty to search for indications of a discovery on a mining claim; nor do they have a duty to go beyond examining the discovery points of a claimant. Their function is to examine the discovery points made available by a claimant and to verify, if possible, the claimed discovery.

Moreover, while a Government mineral examiner must have cognizance of the normal uses and methods of beneficiation of any mineral in formulating an opinion as to whether a discovery of a valuable mineral deposit has occurred (cf. United States v. Hooker, 48 IBLA 22 (1980)), there is absolutely no requirement that a mineral examiner consider all theoretical uses for the claimed mineral or unproven methods of beneficiation as a predicate of his or her expert opinion. When a Government mineral examiner testifies that, based upon an examination of the claim and considering both the normal uses and modes of extraction of any mineral located thereon, there is disclosed no evidence of a valuable mineral deposit such as would justify a reasonably prudent individual in the further expenditure of his or her labor and means with a reasonable prospect of success in developing a paying mine, a prima facie case has been presented. If a mining claimant wishes to show that a mineral deposit embraced within the claim is valuable either because of unusual uses to which the mineral may be put, or because a new method of extraction reduces the cost of beneficiation, it is the claimant's affirmative duty to raise such a claim and present evidence thereon. A claimant might well ultimately preponderate on such a showing, but the failure of the Government to expressly negate the existence of such a possibility does not invalidate its prima facie case.

Two Government mining engineers testified as to their examination of the claims and gave reasons why each was of the opinion that no valuable mineral deposit had been discovered on either claim. That was sufficient to make a prima facie case in support of the contest allegations. United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975) cert. denied, 423 U.S. 829 (1976), rehearing denied, 423 U.S. 1009 (1976); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959).

As the Judge has indicated when the Government contests a mining claim on a charge of lack of discovery of a valuable mineral deposit, it bears the burden of going forward with sufficient evidence to establish a prima facie case, the burden then shifts to the claimant to overcome that showing by a preponderance of the evidence. United States v. Zweifel, supra; United States v. Slater, 34 IBLA 31 (1978).

This Board has repeatedly emphasized that in determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered. Therefore if evidence presented by the contestee shows that there has not been discovery of a valuable mineral deposit, it may be used in reaching a decision that the claim is invalid for lack of discovery, regardless of any defects in the Government's prima facie case. United States v. James S. Sette, 46 IBLA 335 (1980); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

It was not incumbent upon the Government to submit evidence of any value of the rocks on the claims, that was the responsibility of the claimants, and they failed to preponderate. The claimants bear the burden of rebutting the Government's case by a preponderance of the evidence, and bear the risk of nonpersuasion if they fail. United States v. Williamson, 45 IBLA 264, 87 I.D. 34 (1980).

Appellants' presentation at the hearing was speculative, at best, and did nothing more than to show that they had yet to attempt to remove any slabs of decorative marble from the claims and sell them at a profit. They had no direct experience in removing and transporting these slabs of marble to the market place. Nor did they possess any equipment for conducting such a large scale and difficult operation. Establishing the marketability of this deposit of limestone requires much more than a mere showing that the deposit is theoretically marketable or intrinsically valuable. Appellants were able only to establish that attempts were being made to explore possible markets or to promote the use of these hypothetical slabs of ornamental marble.

Discovery of valuable minerals under the Federal mining laws exists only where minerals found are of such a character that a person of ordinary prudence would be justified in further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. Discovery requires the showing that the mineral could be profitably extracted, removed, and marketed at a profit. United States v. Williamson, supra.

It is uncontroverted that appellants made their locations in 1956 and that they have done desultory exploratory work during subsequent years. But they have not demonstrated that a valuable mineral deposit exists now or has ever existed within the limits of either claim. Location is the act of marking boundaries of a mining claim, but it confers no rights until a discovery is made, and until a discovery of a valuable mineral deposit is shown on the claim, the location is invalid. Cole v. Ralph, 252 U.S. 286 (1920).

Evidence of mineralization which may justify further exploration, but not development of actual mining operations, is not sufficient to establish that a discovery of a valuable mineral deposit has been made. United States v. Estate of W. C. Wood, 34 IBLA 44 (1978).

[2] Appellants never extracted nor sold any mineral material from the claims at issue, nor did appellants demonstrate that the rock on the claims was possessed of such unique physical characteristics as to remove it from the ambit of the Act of July 23, 1955, 30 U.S.C. § 611 (1976). Without evidence that the limestone has a property giving it a special and distinct value, it is a common variety no longer locatable under the United States mining laws. The test of "uncommonness" is not met by speculation that the mineral material might be extracted in blocks of sufficient size as to permit slabs suitable for making table tops or other ornamental use. United States v. Henri, 46 IBLA 221 (1980).

Therefore, on the basis of the record as a whole, we agree with the Judge's conclusion that appellants failed to meet their burden of overcoming the Government's showing by a preponderance of the evidence.

[3] The Judge found from the evidence that the contestant established a prima facie case of no discovery, and that the contestees failed to show by a preponderance that a discovery existed at the relevant times. The Judge's decision sets out the pertinent evidence and the applicable law. This Board has considered the record in light of appellants' brief and we agree with the decision and adopt it as the decision of the Board. A copy of it is attached hereto.

[4] Appellants also charge that there is unfairness in these administrative proceedings and the transcript is not a true report of the proceedings, which violates their constitutional rights to due process of law. It suffices to say that these are merely bare allegations totally without merit. This Board has consistently pointed out that the procedures followed by the Department of the Interior in the initiation, prosecution, and deciding of mining contest cases are in full compliance with the Administrative Procedure Act (APA), 5 U.S.C. § 556 (1976). United States v. Fisher, 37 IBLA 80, 83, 84 (1978); and cases cites therein.

Due process consists of proper notice and opportunity for an agency hearing in accordance with the APA. United States v. Weiss, 15 IBLA 198 (1974); United States v. McCall, 1 IBLA 115 (1970). The procedure followed in this case comports with the requirements of the United States Constitution. Judge Steiner is a qualified hearing officer authorized to conduct agency hearings under the APA. Appellants have not set forth any specific instance of impropriety at the hearing or conflict of interest in the hearing officer. Appellants were given adequate notice of the hearing and appeared at the hearing to present evidence on their own behalf as to the validity of the mining claims at issue, as well as to cross-examine the Government's witnesses. Due process has been satisfied.

Regarding appellants' allegations that the transcript is "so much in error that it is not a true report of the proceedings," we note that appellants' entire argument consists of a statement that "[b]ecause of a lack of time, it can only be said that the document speaks for itself." Inasmuch as appellants have not even attempted to substantiate their claim, a claim which we note was not raised before the Administrative Law Judge, their naked assertion that their due process rights have been violated by reason of a garbled transcript must be rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Anne Poindexter Lewis
Administrative Judge

We concur:

_____
Douglas E. Henriques
Administrative Judge

_____
James L. Burski
Administrative Judge

January 31, 1979

United States of America,	:	Contest No. CA-4906
	:	
Contestant	:	Involving the LUCKY 7 PLACER
	:	MINING CLAIM, situated in
v.	:	Sec. 13, T. 24 N., R. 8 E.
	:	Mount Diablo Meridian
Joseph J. Segna, et al.,	:	Plumas County, California
	:	
Contestees	:	Contest No. CA-4967
	:	
Plumas County, California,	:	Involving the HOPE PLACER
	:	MINING CLAIM, situated in
Intervenor	:	Sec. 18, T. 24 N., R. 9 E.,
	:	Mount Diablo Meridian,
	:	Plumas County, California

DECISION

Appearances: Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California,
for the Contestant.

Ian G. Allen, Esq., Attorney, Sunnyvale, California,
for the Contestees.

Susan R. Roff, Deputy County Counsel, Plumas County, California, for the Intervenor.

Before: Administrative Law Judge Steiner.

This is an action brought by the Bureau of Land Management on behalf of the United States Forest Service, pursuant to the Hearings and Appeals Procedures of the Department of the Interior, 43 C.F.R. Part 4, to determine the validity of the above-named placer mining claims.

The Contestant filed similar Complaints herein on April 17, 1978. The Complaints allege, inter alia, as follows:

"A. There are not presently disclosed within the boundaries of the mining claim, nor were there disclosed from July 23, 1955, to the present, minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
B. The land embraced within the claim is non-mineral in character.

C. The claim is not held in good faith for mining purposes."

The Contestees filed timely Answers denying the foregoing allegations of the Complaints.

The cases were consolidated and a hearing was held on August 29 and 30, 1978 in Sacramento, California. The County of Plumas, California, was recognized as an Intervenor. (Tr. 6). Currently, the Contestees have on file a civil action against the County of Plumas and the State of California seeking damages for alleged trespass and inverse condemnation on the two contested mining claims. (Tr. 3).

Ian G. Allen was called as an adverse witness by the Contestant. He testified the claims were located for limestone, quartz, shale and other valuable minerals. (Tr. 18, Ex. 1 and 2). Another valuable mineral on the claims would be building stone. The shale on the claims would be used in cement processing and for bedding material in gardening. However, quartz would not be mined on the claims. (Tr. 20). Mr. Allen admitted he had a limited background in mining. He could not recall what amount of work he had performed on the claims when he located them. Most of the work performed was by pick and shovel. (Tr. 22). When asked how he selected his discovery points, Mr. Allen replied:

"There was very good outcroppings of limestone there. We identified it as limestone by using a very simple test which I was familiar with, and which also had been mentioned to us by the same material people at United States Steel, and that is that we had a bottle of hydrochloric acid with us which we used with merely something that looked like limestone, which I felt that I was able to recognize, and I think the others too, because of the fact they had been around it; put some drops of hydrochloric acid with it, and it reacted in the laboratory the way they say limestone is to react, and so that's how we determined it." (Tr. 23).

No tunneling or drilling was done on the claims. The only work performed was for open face location. (Tr. 23). Although samples of minerals were taken from the claims, Mr. Allen could not recall exactly where they were taken from. He indicated the samples could have been randomly selected from exposed areas on the surface of the claims. (Tr. 25). He could not recall from which claim the individual samples were taken. The samples may have been taken from other claims that Mr. Allen has. (Tr. 26). Moreover, he did not know exactly where his discovery points for the claims were. (Tr. 28). Mr. Allen could not describe in particular what additional development was done on the claims. (Tr. 30). He has not removed or produced any material from the two claims. (Tr. 31). No sales of any material from the claims have ever been made. (Tr. 33). He could not recall how many companies he had contacted in an attempt to sell the materials. (Tr. 34).

Mr. Allen could not determine how much limestone is on the Hope claim. He has not performed any core drilling to make an evaluation. (Tr. 40). However, a mineral examination of the Lucky 7 carried out by Mr. K. F. Bickford, reported, in 1958, an estimated 5.5 million ton deposit of limestone. (Tr. 41, See Ex. E). However, no core drilling has been performed to verify these findings. (Tr. 41). More importantly, the Bickford report recommended that no further work be undertaken because the limestone found is too high in magnesia content and also because the limestone reserves are too low for any sizeable operation. (See Ex. E, Tr. 43).

Walter Martes, the Assistant Road Commissioner for Plumas County, was the resident engineer who designed, surveyed and inspected the road project that was constructed over the two claims in 1974. A right-of-way over sections 12 and 13, T. 24 N., R. 8 E. and Section 18, T. 24 N., R. 9 E. MDB&M was granted by the U.S. Department of Transportation to Plumas County in 1974. (See Ex. 18). During the construction of the road, Mr. Martes walked over portions of the road in order to survey and inspect the project. (Tr. 64). He found a small 6 x 8 leveled area 25 feet away from the road near the northeast corner of the Lucky 7 claim. (Tr. 65). However, he did not find any access roads into that area. No other improvements were found. (Tr. 66). No monuments or location notices were found. (Tr. 81). He stated that the materials uncovered beneath the roadbed were comprised of clays and dirt. (Tr. 79).

Henry W. Jones, after having been duly qualified as a mining engineer, testified that he examined the Hope and Lucky 7 claims in November, 1976 with Mr. Emmett Ball. Other inspections were made in December, 1976, with Mr. Allen and Mr. Joseph J. Segna. Samples were taken at that time. (Tr. 87). During this later inspection Mr. Allen indicated that one of his original discovery points was removed by the road work performed by Plumas County. (Tr. 80).

Mr. Jones stated that there is no limestone deposit on the Hope claim although there is evidence of minor lime particles. Whatever particles are exposed are not of high grade. During the course of the Jones' inspection of the Hope claim, Mr. Segna made reference to a discovery point. However, this discovery point was in an area that Mr. Jones knew to be previously patented land. (Tr. 88). The Contestees declared they wished to mine the claims for large blocks of limestone for marble tops. Also, they intended to construct a portable plant to produce cement. (Tr. 89). But the Contestees admitted they had made no sales of any materials from the claims. No other discovery points were pointed out by the Contestees during Mr. Jones' inspections. A new bulldozer cut was found on the claims. It was a 70-foot long cut. Mr. Jones also found a tin can containing a notice of location. (Tr. 90). He took a sample, AFS 1993, on November 14, 1977 from this new cut. Other samples were taken. AFS 1976 was taken on October 20, 1970 in the company of Emmett Ball. On November 5, 1976, AFS 1977 was taken. (Tr. 91, See Ex. 15). These samples were assayed by Metallurgical Laboratories of San Francisco, California. (Tr. 91). He stated that there is no market for limestone in the Quincy area which is several miles away from the claims. There is a limited market in the Sacramento and San Francisco area. (Tr. 92).

There has been no production of limestone from the Quincy area because it is so rugged and is at a great distance from a market. Furthermore, Mr. Jones believes there are more reliable sources near the market sites. (Tr. 93). It was his opinion that there was no market for limestone in the area at the time the claims were located in 1956. (Tr. 93).

Emmett Ball, a mining engineer for the USFS who has examined many limestone properties throughout his career, stated he accompanied Mr. Jones on several inspections of the claims in 1976. (Tr. 104). He corroborated Jones' findings and stated that samples were taken from the claims. (Tr. 104). He did not observe any limestone deposits on the Hope claim.

The only material on the claims that Mr. Ball believed could be marketable is limestone. (Tr. 105). At this time, the available markets that could use limestone are amply supplied from sources closer than these claims. The production of cement from these claims would require a larger deposit of limestone than that currently exposed. (Tr. 106). He does not know of any market in which this material could be sold even though Sample AFS-1993 indicates a high quality limestone. (Tr. 107). He concluded that a prudent man would not be justified in expending money and labor in developing these claims either in 1956 or at the present time. (Tr. 107). Furthermore, any accurate estimate of the extent of any deposit of limestone on the claims would require core drilling. (Tr. 13, Vol.II).

On cross-examination, Mr. Ball agreed that if a person could make $50 a ton net profit from the limestone deposits then the prudent man standard would be met. He believed the small limestone deposit would not "come close to paying off a plant" even if a small scale operation was used. (Tr. 111). Typical production costs for quarrying limestone would be a dollar and a half. (Tr. 2, Vol. II).

Mr. Ian Allen was recalled as a witness. Four small 4-inch by 8-inch pieces of polished dark gray limestone were introduced into evidence (Ex. K-N). He could not point out exactly where these limestone samples were taken from. (Tr. 20-25, Vol. II). He further testified he wanted these samples taken randomly from the claims. Several letters attesting to the suitability of the limestone samples for use as decorative building stone were also submitted. (Ex. A-C). However, a letter from the Emil Cellini Company, a dealer for polished stone table tops, indicated that 2-feet by 5-feet pieces of stone are potentially marketable. (See Ex. C).

According to an offer made to Mr. Allen by the Bianco Marble Company, the limestone could be sold for $3 a square foot in 3/4 inch thick slabs. (Tr. 30, Vol. II). However, Bianco would want slabs 4.5-feet by 8-feet. Pieces of this size would sell for $324 a ton. (Tr. 31). Transportation costs from Quincy to San Jose, California would be $28 a ton. (Tr. 31, Vol. II). Quarrying costs would be $3 a ton. (Tr. 32, Vol. II). However, every ton quarried would not produce a marketable ton of material. (Tr. 38, Vol. II).

On cross-examination, Mr. Allen stated that the only equipment the Contestees presently own are picks and shovels. (Tr. 46, Vol. II). He could not recall the extent of exposed development on the claims. Specifically, he stated, "I don't know. You see, what's important with us is not trying to get down there and measure how many teacup-fulls we have removed. The important thing is to try to work up an access to get to the stone and take it out of there." He stated that an access road must be built to the claims. (Tr. 47, Vol. II).

Of the places exposed by Mr. Allen, the materials uncovered look the same. (Tr. 49, Vol.II). The material is of the same quality and uniformity at whatever depth below the surface. (Tr. 50, Vol II). However, he cannot determine how much material is on any one claim. (Tr. 54, Vol II). He stated that the Bickford mineral report (Ex. E) discussed a mineral deposit that extends beyond the limits of the Hope and Lucky 7 claims. (Tr. 55, Vol.II). He had not produced any large pieces of limestone from the claims. He does not have the equipment to produce large 4 x 4 foot pieces. (Tr. 58, Vol.II). Moreover, he could not find any limestone deposits on the Hope claim after the road was built on that claim. (Tr. 61. Vol II). He also could not recall if the assessment work for each of the claims has been performed annually. (Tr. 64, Vol. II).

Analysis

Under the mining laws of the United States [30 U.S.C. § 22 et seq. (1970)], a valid location of a placer mining claim requires discovery of a valuable mineral deposit within the limits of the claim. The rule as to what constitutes a valid discovery has been stated as follows:

> "* * * Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. * * *" Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313 (1905); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963).

When the Government contests a mining claim, it has assumed the burden of presenting a prima facie case that the claim is invalid. When it has done so, the burden then devolves on the mining claimant to prove by a preponderance of the evidence that the claim is valid. United States v. Zweifel, 508 F. 2d 1150, 1157 (10th Cir. 1975); United States v. Springer, 491 F. 2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 234 (1974); Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959).

Where a Government mineral examiner testifies that he has examined a claim and found the mineral values insufficient to support a finding of discovery, a prima facie case of invalidity has been established. Government mineral examiners are not required to perform discovery work for a claimant or to explore beyond a claimants' workings. United States v. Ruth Arcand, et al., 23 IBLA 226 (1976). It is incumbent upon the mining claimant to keep discovery points available for inspection by a Government mineral examiner. United States v. Beatrice Ann Johnson, 33 IBLA 121 (1977); United States v. Emma Elizabeth Conner, et al., 31 IBLA 173 (1977). Geologic inference alone cannot support a determination under the mining law that a discovery of a valuable mineral deposit has been made. The claimant must actually expose a valuable mineral deposit physically within the limits of the claim. United States v. Richard B. Walls 30 IBLA 333 (1977).

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws. Act of July 23, 1955, 30 U.S.C. § 611. If there is insufficient evidence that a stone is an uncommon variety within the meaning of 30 U.S.C. § 611, it is not locatable under the mining laws.

United States v. Margaret Mansfield 35 IBLA 95, 98 (1978) citing United States v. Coleman, 390 U.S. 599 (1968).

Where a large quantity of similar stone is available from other deposits in the same general market area, the stone is not unique and therefore does not have a distinct and special value. United States v. Coleman, supra; Brubaker v. Morton, 500 F. 2d 200 (9th Cir. 1974); Boyle v. Morton, 519 F. 2d 551 (9th Cir. 1975). The Court, in McClarty v. Secretary of the Interior, et al., 408 F. 2d 907 (9th Cir. 1969), approved the following guidelines to determine whether a stone has some unique feature to distinguish it from otherwise common varieties of stone.

> "(1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place."

A deposit of limestone cannot be characterized as a deposit of an uncommon variety of limestone when the claimant fails to show what particular quality or use of the limestone makes it an uncommon variety. Even if a deposit of limestone meets all other requirements necessary to constitute it an uncommon variety of stone it is not a valuable mineral deposit within the mining laws if the claimant cannot show that it is marketable at a profit. United States v. Harold Ladd Pierce 75 I.D. 255 (1968), cited in United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331 (1969), United States v. W. G. Nickol, et al., 9 IBLA 117 (1973).

If mining claimants have held claims for several years and have attempted little or no development or operations, a presumption is raised that the claimants have failed to discover valuable mineral deposits or that the market value of discovered minerals was not sufficient to justify the cost of extraction. See United States v. Zweifel, supra; United States v. Humboldt Placer Mining Co., 79 I.D. 709 (1972); United States v. C. V. Hollenbeck, et al., 21 IBLA 290 (1975).

Establishing the marketability of a mineral deposit requires more than a showing that the mineral is theoretically marketable or intrinsically valuable. The claimant must demonstrate present continuing demand for the output of his mine. It is not sufficient to show that attempts are being

made to explore possible markets or to promote the utilization of the mineral. United States v. Michael Slater 34 IBLA 31 (1978).

Based upon the testimony of the two USFS mining engineers, the Contestant has established a prima facie case that the limestone and shale on the claims are of a common variety, not presently locatable under the general mining laws. The Contestant has also established a prima facie case of lack of discovery of any valuable minerals on the two claims. No deposit of limestone or shale was found during the inspections. Moreover, no discovery points were found. (Tr. 88-90). Both mineral examiners testified there is no market for any of the limestone that could be produced from the claims. (Tr. 106). Nor is it economically feasible to produce cement from the materials found on the claims. (Tr. 111).

The Contestees have failed to submit sufficient evidence to show they have located an uncommon variety of stone on the claims. Although the Contestees contend there is a market for the limestone from the claims, they have not made a sale as of this date. At most, this future market is a speculative one. There is no present production of any minerals from the claims. The Contestees have introduced no evidence to refute Mr. Ball's testimony that limestone can be supplied from other sources much closer to the available markets. The Contestees have failed to introduce sufficient probative evidence to establish that a deposit of minerals marketable in 1956 or as of the present time, has been exposed on either of the subject claims.

It is concluded that there has been no discovery of a valuable mineral deposit within the limits of the claims.

Since the foregoing conclusion is dispositive of this proceeding, it is unnecessary to consider the mineral character of the subject land or the good faith of the mining claimants.

Accordingly, the Hope and Lucky 7 placer mining claims are hereby declared null and void.

R. M. Steiner
Administrative Law Judge

Enclosure: Information Pertaining to Appeals Procedures

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